

# CENTER FOR LAW AND EDUCATION

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January 27, 2014

John King  
Commissioner of Education  
89 Washington Ave., Room 111  
Albany, NY 12344

Members of the Board of Regents  
New York State Education Department  
Board of Regents, Room 110 EB  
89 Washington Ave., Room 111  
Albany, NY 12344

Sent via e-mail

Re: Public Comments on the New York State Department of Education ESEA Flexibility renewal proposal Amendment #1

Dear Commissioner King and Members of the Board of Regents:

The Center for Law and Education (CLE) submits its comments reflecting strong opposition to Amendment #1 of the NYSED ESEA Flexibility Renewal Request. We believe that proposed Amendment #1 violates federal statutory and civil rights laws designed to ensure that students with disabilities who are capable of making significant progress toward the standards set for all, and therefore, "are not eligible for the State's alternate assessment based on alternate academic achievement standards," are not mislabeled, isolated, assessed using "below-grade" testing, educated to lower standards, and then counted as "proficient or advanced." Accordingly and as further discussed below, CLE requests that NYSED delete Amendment #1 from its ESEA flexibility renewal proposal.

CLE is a national advocacy organization that works with parents, advocates and educators to improve the quality of education for all students, and in particular, students from low-income families and communities. Throughout its history, CLE has been a recognized leader in advancing the rights of students with disabilities -- from federal policy through state and local implementation. In the course of its work CLE has worked closely with New York legal services attorneys, other public interest and private attorneys representing low-income students on a pro bono basis, and with parent advocates and parents seeking to implement their children's rights under Title I of the Elementary and Secondary Education Act (ESEA) and, as appropriate, the Individuals with Disabilities Education Act (IDEA), and to protect their civil rights.

Because CLE supports the detailed comments submitted by The Advocacy Institute, we will not repeat those extended comments, but will limit our comments to three key points that we would like to underscore. *First*, CLE believes that NYSED's ESEA Flexibility renewal proposal Amendment #1 is not consistent with the requirements governing ESEA Flexibility Renewal Request as established by the U.S. Department of Education (ED) to provide additional time for a state to gather more information about

successes and challenges in the implementation of the reform efforts described in their initial flexibility request so as to improve current systems and better support students and teachers. Amendment #1 is not a 'renewal' of NYSED's current ESEA Flexibility but an entirely new request to create a new assessment option unsupported by research and data and completely at odds with a mandatory assurance made as a condition of NYSED's application for its original waiver that was not related to the assessment of students with disabilities. Consistent with Principle 1, ESEA Flexibility Request form, September 23, 2011, NYSED gave a written assurance that "[i]t will develop and administer no later than the 2014-15 school year alternate assessments based on grade-level academic achievement standards or alternate assessments based on alternate academic achievement standards for students with the most significant cognitive disabilities that are consistent with 34 C.F.R. §200.6(a)(2) and are aligned with the State's college-and career-ready standards."

NYSED is complying with this requirement by continuing to provide its Alternate Assessment on Alternate Academic Achievement Standards (AA-AAS) via its NYSAA. NYSED has also assumed a leadership role as a governing member state of the PARCC. Although NYSED never developed an Alternate Assessment based on Modified Academic Achievement Standards (AA-MAS), it is significant that ED has provided clear notice through its NPRM, 78 Fed. Reg. 52468, August 23, 2013 that the AA-MAS will be phased out at the end of the 2013-14 school year, in part, because the performance of students identified and assessed [and presumably taught] based on modified standards was NOT discernable from the achievement of Title I students without disabilities. NYSED's Amendment #1 can be expected to have the same impact.

Second, Amendment #1 violates the rights of this undefined classification of students with significant and/or severe disabilities, who cannot —despite NYSED's assurances to the contrary— be validly identified by documented, objective evidence, and multiple measures by their Individualized Education Program (IEP) Teams consistent with their rights and protections under the Individuals with Disabilities Education Act, and ESEA [34 C.F.R. §200(1)(e) ], including the right to participate using appropriate accommodations as necessary in all state and district assessments based on grade level standards consistent with 20 U.S.C. § 1412(a)(16); 34 C.F.R. § 300.320(a)(6)(i) and 34 C.F.R. §200.6(a)(1)(ii)(A) as all other NY students with the exception of those assessed on the NYSAA. The proposed Amendment to assess at their instructional grade levels this group of undefined students with disabilities who, ***just as large percentages of struggling Title I students, including racial and ethnic minority students and ELLs,*** "can make significant progress, but *are not likely to reach grade-level achievement* in the time frame covered by their ***[annual]*** individualized education programs (IEP)," violates the statutory rights of these students under IDEA and the ESEA as well as the civil rights of this group of unidentifiable students with disabilities under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA).

The very purpose of the summative assessment at issue— which is **NOT** a formative assessment—is to examine the effectiveness of the instruction being provided all students, including Title I students, racial and ethnic minority students, ELLs and ALL students with disabilities (except those assessed on the NYSAA), to determine whether students are learning what they are expected to know based on the Common Core Learning Standards, and, if not, to identify what interventions are needed to improve their achievement outcomes. To use below-grade tests to assess *[and to teach]* an undefined subset of students with disabilities whose pace of learning and academic outcomes cannot be predicted and differentiated from other struggling students with and without disabilities cannot be countenanced.

For other students, the core structure of current ESEA (known as NCLB) creates a presumption that students' not becoming proficient or advanced performance in relation to the full range of state standards indicates that the quality of their instruction needs to be improved in order to get them to proficient and advanced levels. For the students at issue here, that presumption becomes non-operative. Instead, for these students, the conclusion is drawn that the reason that are not fully mastering the standards is that they are simply incapable of doing so at least within the annual

timeframe of their IEP – and the assessment results based on below-grade testing will themselves be used to justify that very divergent conclusion and then to continue to educate them to lower standards.

It is important not to lose sight of the fact that the purpose of the assessment system under Title I is, in fact, to determine whether the student has received high quality instruction in the first place. State accountability systems are expected to make schools and school districts accountable to parents and students, not subject students to reduced standards of learning when the school/school district have failed to effectively educate the student to meet grade level proficiency.

Furthermore, Section 504 and its long-standing regulations require that students with disabilities not be discriminated against or denied comparable aids, benefits or services. 34 C.F.R. §104.4(b). The setting of lower standards for assessing certain students with disabilities – here a set of undefined students with cognitive disabilities who are not eligible to take the NYSAA because they can, in fact, make significant progress but, similar to many other struggling students without disabilities, “are *not likely to reach* grade-level achievement in the time frame covered by their individualized education programs (IEP),” will inevitably mean that most of these students will not be taught those skills and bodies of knowledge expected for all students, at the age and grade levels expected for all students, that are not included in the same form in the below-grade testing proposed by Amendment #1. The lower standards set for these students will set the ceiling of their education as they are incorporated in their IEPs and their overall instruction. This is clearly a violation of Section 504 and the ADA when, by definition, this group of students is even acknowledged by NYSED as capable of meeting grade-level standards, but just “not likely to reach grade-level achievement in the time frame covered by their individualized education programs (IEP)...” Compounding the denial of comparable benefits to the subset of students with disabilities, whom NYSED is proposing to assess below-grade level, is the request to “allow the proficient and advanced scores” of these students “assessed in accordance with their instructional level [to] be used for accountability purposes...” Any student who is assessed [and likely taught] below-grade level who attains a proficient or advanced score is likely mislabeled and being deprived of her right to be taught and assessed based on rigorous grade level standards comparable to her age and grade level non-disabled peers.

CLE urges the Board of Regents to consider our comments, particularly read in conjunction with the thoughtful and more extensive comments submitted by The Advocacy Institute, and to strike Amendment #1 from NYSED’s ESEA Flexibility Renewal Proposal.

Thank you for your consideration and attention to this serious issue.

Yours truly,



Kathleen B. Boundy  
Co-Director